STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Elizabeth L. Gleicher, P.J., Michael J. Kelly and Douglas B. Shapiro, JJ.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

JOEL EUSEVIO DAVIS

Defendant-Appellant.
_____/

Supreme Court No. 160775

Court of Appeals No. 332081

Circuit Court No. 15-5481-01

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant
_____

DEFENDANT-APPELLANT'S

SUPPLEMENTAL BRIEF AFTER REMAND

(ORAL ARGUMENT REQUESTED)

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Statement of Jurisdiction

Mr. Davis appealed by right to the Court of Appeals pursuant to Const 1963, art 1, §20; MCL 600.308(1); MCL 770.3; MCR 7.203(A); and MCR 7.204(A)(2) following the sentences imposed for his convictions by jury trial. This Honorable Court now has jurisdiction following the Court of Appeals' opinion entered on remand from this Court. MCR 7.303(B)(1). See also the Statement of Jurisdiction in the application for leave to appeal.

Statement of Questions Presented

I. Do MCL 750.81a and MCL 750.84 contain contradictory and mutually exclusive provisions, reflecting a legislative intent not to allow for convictions for both crimes for the same conduct? Do Mr. Davis' convictions for both thus violate the state and federal constitutional prohibitions against double jeopardy?

A. Is the legislative intent against multiple punishments demonstrated by the plain language of the statutes, i.e., their contradictory and mutually exclusive *mens rea* provisions? In holding to the contrary, did the Court of Appeals render statutory language nugatory or surplusage?

B. Does the "any other violation" provision of MCL 750.84(3) not mean that the statutory language "intent to do great bodily harm, less than the crime of murder" in the prior subsection (1)(a) or that the statutory language "without intending to commit murder or to inflict great bodily harm less than murder" from MCL 750.81a(2) can be stripped from the statutes or otherwise rendered nugatory or surplusage?

C. Did the Court of Appeals improperly look to the legislative history where the statutory language is clear? Moreover,did the Court of Appeals then misapprehend the meaning of the legislative history?

D. This Court does not need to overrule *People v Doss*. The *Doss* decision did not address a double jeopardy question and thus it does not control the result in this case. However, should this Court clarify that *Doss* is not to be extended beyond its narrow circumstances of a single charge?

Court of Appeals answered, "No".

Circuit Court made no answer.

Joel Eusevio Davis answers, "Yes".

II. Is Mr. Davis entitled to relief from the double jeopardy violation even though the error was not preserved in the trial court? Are double jeopardy errors jurisdictional or the equivalent and, as such, *Carines'* four-pronged test for unpreserved error that occurs in the conduct of a trial does not apply? Alternatively, if this Court finds that it does apply, is Mr. Davis still entitled to relief under that test?

A. Do Jurisdictional errors go to the heart of the government's ability to exercise authority over individuals and thus cannot be waived or forfeited?

B. Has this Court held that double jeopardy violations are within the small class of jurisdictional errors?

C. Has this Court held that defendants are entitled to relief even on collateral review under MCR 6.508(D)(3) from jurisdictional defects such as double jeopardy? Has th Court of Appeals applied this Court's holding to grant such relief on collateral review?

D. Has the Court of Appeals wrongly extended the forfeiture doctrine to double jeopardy violations raised on direct appeal despite that such errors fall within this Court's definition of "jurisdictional defect?"

E. Even so, does the Court of Appeals routinely grant relief from "forfeited" double jeopardy violations with no discussion of the application of *Carines*?

F. This Court has not authorized the extension of the forfeiture doctrine to jurisdictional errors, and should it not do so now?

G. Alternatively, if this Court does extend the forfeiture doctrine to jurisdictional error, should this Court hold that the nature of the double jeopardy violation satisfies prongs three and four of the *Carines*? Would Mr. Davis still be entitled to relief?

Court of Appeals answered, "No."

Circuit Court made no answer.

Joel Eusevio Davis answers, "Yes."

Statement of Facts

Appellate Background

This case returns to this Honorable Court following remand to the Court of Appeals. In his first appeal, Joel Davis argued that his convictions for both Aggravated Domestic Assault and Assault with Intent to do Great Bodily Harm (AWIGBH) violated double jeopardy prohibitions, as the two offenses have conflicting and mutually exclusive intent requirements. The Court of Appeals held that double jeopardy was the wrong focus, and instead vacated the Aggravated Domestic Assault conviction as being a mutually exclusive verdict. *People v Davis*, 320 Mich App 484, 489-497 (2017), vacated in part by 503 Mich 984 (2019). After hearing oral argument, this Court vacated that portion of the Court of Appeals' opinion and remanded for it to decide the double jeopardy claim, stating in part:

***

> Regardless of whether this state's jurisprudence recognizes the principle of mutually exclusive verdicts, this case does not present that issue. In this case, the jury was instructed that to convict defendant of AWIGBH, it must find that defendant acted "with intent to do great bodily harm, less than the crime of murder." See MCL 750.84(1)(a). However, with respect to Aggravated Domestic Assault, the jury was not instructed that it must find that defendant acted without the intent to inflict great bodily harm. See MCL 750.81a(3); *People v Doss*, 406 Mich 90, 99 (1979) ("While the absence of malice is fundamental to manslaughter in a general definitional sense, it is not an actual element of the crime itself which the people must establish beyond a reasonable doubt."). Since, with respect to the Aggravated Domestic Assault conviction, the jury never found that defendant acted without the intent to inflict great bodily harm, a guilty verdict for that offense was not mutually exclusive to defendant's guilty verdict for

> AWIGBH, where the jury affirmatively found that defendant acted with intent to do great bodily harm. Thus, the Court of Appeals erred by relying on the principle of mutually exclusive verdicts to vacate defendant's Aggravated Domestic Assault conviction. We thus VACATE that part of the Court of Appeals judgment relevant to that finding.
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> ***
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> Accordingly, we REMAND this case to the Court of Appeals for reconsideration of the parties' arguments in light of *People v Miller*, 498 Mich 13 (2015). We also direct the Court of Appeals to determine and apply the appropriate standard of review to this double-jeopardy challenge because the applicable standard of review was not explicitly addressed by the Court of Appeals in its July 13, 2017 judgment. (Footnotes omitted.)

People v Davis, 503 Mich 984 (2019); 42a.

On remand, in a 2-1 decision, the Court of Appeals' majority held that convictions for the two offenses with their conflicting *mens rea* provisions did not violate double jeopardy principles under *Miller* because of subsection 3 in the AWIGBH statute, MCL 750.84, which provides: "This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same conduct as the violation of this section." *People v Davis (On Remand)*, unpublished per curiam opinion of the Court of Appeals, No. 332081, dated November 12, 2019, p 6; 48a. The majority also relied on the legislative history of the two statutes. *Id.* at 4-7; 46a-49a

The Honorable Douglas B. Shapiro dissented, and explained that the entry of mutually exclusive judgments violates due process and should not be allowed to stand:

> In my view, our prior opinion erred by defining the problem as one of mutually exclusive verdicts instead of a [sic] mutually exclusive judgments. The Supreme Court reversed

> because verdicts cannot be mutually exclusive when the jury is not instructed on the element that creates the inconsistency. I respectfully suggest, however, that while whether or not a jury is instructed on a negative element is relevant to a claim of mutually exclusive verdicts, it is irrelevant to the question whether the court violates a defendant's due process rights by entering a judgment for two crimes that by their terms cannot exist simultaneously. The jury is not aware that the crimes are by their plain language mutually exclusive, but the court is and, in my view, must therefore decline to enter a judgment of conviction for both offenses.
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> ***
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> The majority notes that MCL 750.84(3) provides that "[t]his section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same conduct as the violation of this section." I agree; a conviction for AWIGBH does not immunize a defendant against convictions of other crimes arising out of the assault. However, the question is not whether as a general matter a defendant may be convicted of other crimes arising out of the assault, but whether the judicial system may adjudge a defendant guilty of two crimes when the statutes defining them make clear that factually only one can exist at a time, i.e., either a defendant has the intent to do great bodily harm or not.
> (COA opinion on remand, dissent pp 1-2; 50a-51a).

Factual Background / Trial Proceedings

Joel Davis was convicted of Aggravated Domestic Assault as a second offender, and Assault with Intent to Do Great Bodily Harm Less than Murder (AWIGBH) following a two-day jury trial before Wayne County Circuit Court Judge Thomas Cameron on February 16-17, 2016. (Felony Information, 1a; T2 99-101, 27a-29a; Judgment of Sentence, 40a). The charges arose out of an incident occurring during the early morning hours of June 10, 2015, at the Dearborn Heights house where the complainant, Shanna Shelton, lived with Mr. Davis, her boyfriend of seven months.

Ms. Shelton and Mr. Davis had been drinking and using cocaine together at the house, and eventually Ms. Shelton fell asleep. T1 168-170, 179-180; 14a-16a, 17a-18a. According to Ms. Shelton, she was asleep with the lights on in the same room as Mr. Davis when, around 4 a.m., he woke her up to ask where she had put the ashtray. *Id.* at 150-151; 3a-4a. Irritated that Mr. Davis woke her, Ms. Shelton responded "with an attitude" that that she did not know. T1 149-150; 2a-3a.

In response, Ms. Shelton claimed, Mr. Davis started yelling at her and dragged her from the bed to the floor. T1 151-152; 4a-5a. When Ms. Shelton responded with an expletive, Mr. Davis allegedly struck her two or three times in the head and face with his hand. *Id.* at 152-153, 189; 5a-6a, 19a. Ms. Shelton got up and ran into the into the living room. Mr. Davis followed her and struck her two or three times in the face and head, eventually knocking her to the floor and bloodying her nose. *Id.* at 153-154, 189-190; 6a-7a, 19a-20a.

Ms. Shelton testified that during the assault Mr. Davis continued hitting her and telling her to "shut up" each time she implored him to stop. When Mr. Davis said, "you're going to make me have to kill you," Ms. Shelton stopped talking and Mr. Davis finally ceased striking her. T1 154-155, 191-192, 200; 7a-8a, 21a-22a, 23a. When the assault was over, Ms. Shelton ran to the bathroom, where she rinsed the blood from her nose and split lip. *Id.* at 155; 8a. She looked in the mirror and noticed both her eyes appeared to be swollen almost shut. *Id.*

After a few moments, Ms. Shelton returned to the living room and noticed Mr. Davis had left, so she started searching for her cell phone to call 911. T1 156-157; 9a-10a. She could not find her phone or her purse, which had about $400 cash in it. *Id.* Ms. Shelton claimed Mr. Davis must have taken her purse and phone when he left. *Id.* She then looked outside and saw that her 2001 Jeep Cherokee was gone as well. *Id.* at 157; 10a.

Ms. Shelton was later changing her clothes when she heard a car pull into her driveway and saw Mr. Davis entering the house. Before he entered the house, Ms. Shelton ran out the back door to a neighbor's house and called 911. T1 158-160; 11a-13a. Officers responded to the scene.

At the close of the evidence, the prosecutor asked the jury to convict Mr. Davis of Aggravated domestic assault, Assault with Intent to Do Great Bodily Harm Less than Murder (AWIGBH), Unlawfully Driving Away of Ms. Shelton's Automobile (UDAA), and Larceny of Property Valued at Between $200 and $2,000. T2 96-103; 24a-31a. The jury found Mr. Davis guilty of Aggravated Domestic Assault and AWIGBH, but found him not guilty of the UDAA and Larceny counts. T2 120-123; 32a-35a.

The trial judge departed above the calculated sentencing guideline range of 29-57 months and imposed an above range sentence of 65 to 120 months in prison for the AWIGBH count, concurrent with a 12 to 60-month sentence on the Aggravated Domestic Assault count. ST 20-23a-39a.

Supplemental Briefing Order

This Court ordered oral argument on the application and supplemental briefing on the following questions: "(1) whether the defendant's convictions under MCL 750.81a(3) and MCL 750.84 violate constitutional prohibitions against double jeopardy, see *People v Miller*, 498 Mich 13 (2015); and (2) if so, whether the defendant is entitled to relief. See *People v Carines*, 460 Mich 750, 763 (1999)." *People v Davis,* ___ Mich ___; 943 NW2d 396 (2020); 52a.

Standards of Review

An appellate court reviews questions of law regarding statutory construction and the application of the state and federal constitutions *de novo* to determine if there was an error below. *People v Miller*, 498 Mich 13, 17-18 (2015); *People v Herron*, 464 Mich 593, 599 (2001). See Issue I, below.

If an error is found, an appellate court then asks the separate question of whether a defendant is entitled to relief. Which test governs whether the defendant is entitled to relief is itself a question of law that this Court reviews *de novo*. *People v Randolph*, 502 Mich 1, 8 (2018); *People v Cain,* 498 Mich 108, 114 (2015). See Issue II, below.

Arguments

I. MCL 750.81a and MCL 750.84 contain contradictory and mutually exclusive provisions, reflecting a legislative intent not to allow for convictions for both crimes for the same conduct. Mr. Davis' convictions for both thus violate the state and federal constitutional prohibitions against double jeopardy.

A person cannot simultaneously intend to do great bodily harm and lack the same intent in committing the same acts against the same person. Where one statute punishes acts committed "without intending to commit murder or to inflict great bodily harm less than murder" and another statute punishes acts committed with "intent to do great bodily harm, less than the crime of murder", the Legislature did not intend for convictions and sentences for both offenses in this situation.

The United States and the Michigan Constitutions provide that no person may be put in jeopardy twice for the same offense. US Const, Ams V,[1] XIV[2]; Const 1963, art 1, § 15.[3] This case involves the multiple punishments strand. See *Miller,* 498 Mich at 17. As this Court explained in *Miller*:

> The multiple punishments strand of double jeopardy "is designed to ensure that courts confine their sentences to the limits established by the Legislature" and therefore acts as a "restraint on the prosecutor and the Courts." The multiple

[1] US Const, Am V, provides in pertinent part that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb...."

[2] The Fifth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *People v Ream*, 481 Mich 223, 255 (2008); *Benton v Maryland*, 395 US 784, 795-796 (1969).

[3] Const 1963, art 1, § 15 provides in pertinent part that "[n]o person shall be subject for the same offense to be twice put in jeopardy."

> punishments strand is not violated "[w]here 'a legislature specifically authorizes cumulative punishment under two statutes....'" Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial. "Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed." (Footnotes omitted.)

Id. at 17-18.

So the double jeopardy question here is one of statutory interpretation. And under the guiding principles of statutory interpretation it is clear that the Legislature did not intent for multiple punishments.

A. The legislative intent against multiple punishments is demonstrated by the plain language of the statutes, i.e., their contradictory and mutually exclusive *mens rea* provisions. In holding to the contrary, the Court of Appeals rendered statutory language nugatory or surplusage.

The Legislature's intent that a person not be convicted and sentenced under both MCL 750.81a(2) and MCL 750.84(1)(a) for the same acts is revealed by the plain language of the two statutes. The statutes contain contradictory and mutually exclusive *mens rea* provisions.

The Legislature defines aggravated domestic assault in relevant part as an assault causing aggravated injury by a person who acts "*without intending to commit murder or to inflict great bodily harm less than murder*." MCL 750.81a(2)[4] (emphasis added). Assault within intent to do great bodily harm (AWIGBH) requires proof that the defendant acted with "*intent to do great bodily harm, less than the crime of murder*." MCL 750.84(1)(a) (emphasis added).

This Court has explained that when statutory language is clear, it must be followed:

> When interpreting a statute, "our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language." "In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." "When a statute's language is unambiguous, ... the statute must be enforced as written. No further judicial construction is required or permitted." *People v Pinkney*, 501 Mich 259, 268 (2018).

In *People v Miller*, this Court wrote of "our well-recognized rule that we 'must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.'" *Miller, supra* at 25 (citation omitted). This Court "will not interpret a statute in such a manner as to treat any

[4] In full, MCL 750.81a(2) provides that "[e]xcept as provided in subsection (3), an individual who assaults his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of the same household, without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both." MCL: 750.81a(3) elevates the offense to a felony punishable by up to five years in prison if the defendant had one or more prior convictions under subsection (2); MCL 750.81 – 750.84 or 750.86; or a law of another state or political subdivision of another state substantially corresponding to the same.

word as nugatory or mere surplusage." *People v Carter*, 503 Mich 221, 229 n 29 (2019). Where statutes use different language, attention must be paid to the difference and this Court will not construe one or both so as to render any part of one of the statutes as nugatory or surplusage. *People v McGraw*, 484 Mich 120, 126 (2009).

The Court of Appeals' majority instead read the language "without intending to commit murder or to inflict great bodily great bodily harm less than murder" out of the Aggravated Domestic Assault statute, and rendered it mere surplusage or nugatory in contravention of this Court's well-established rules for statutory construction. Because the plain language chosen by the Legislature does not provide for a defendant to be convicted and punished under both of these two statutes for the same acts, allowing both convictions to stand violates the state and federal constitutional prohibitions on double jeopardy.

B. The "any other violation" provision of MCL 750.84(3) does not mean that the statutory language "intent to do great bodily harm, less than the crime of murder" in the prior subsection (1)(a) or that the statutory language "without intending to commit murder or to inflict great bodily harm less than murder" from MCL 750.81a(2) can be stripped from the statutes or otherwise rendered nugatory or surplusage.

Contrary to the Court of Appeals' majority conclusion, the language in MCL 750.84(3) that allows for conviction and punishment for "any other violation of law arising out of the same conduct as the violation of this section," does not compel a different result. Related statutes are *in pari materia* and must be read together in harmony. In *Webb,* this Court explained:

> In addition, when this Court construes two statutes that arguably relate to the same subject or share a common purpose, the statutes are in *pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 359–360; 459 NW2d 279 (1990); *Crawford Co v Sec'y of State*, 160 Mich App 88; 408 NW2d 112 (1987). The object of the in *pari materia* rule is to give effect to the legislative purpose as found in harmonious statutes. *Jennings v Southwood*, 446 Mich 125, 136–137; 521 NW2d 230 (1994). If statutes lend themselves to a construction that avoids conflict, then that construction should control. *House Speaker v State Administrative Bd*, 441 Mich 547, 568–569; 495 NW2d 539 (1993).

Webb, 458 Mich at 274.

Here, MCL 750.84(3) allows for conviction and punishment for AWIGBH under Subsection (1)(a) along with "any other violation of law arising out of the same conduct as the violation of this section." But MCL 750.84(3) is inapplicable where an offense statute, such as MCL 750.81a (Aggravated Domestic Assault), contains a conflicting and mutually exclusive *mens rea* provision such that the defendant could not be guilty of having violated it and simultaneously having violated MCL 750.84(1)(a) (AWIGBH). The same conduct just cannot be in violation of both under those circumstances, so there is no "other violation" as to MCL 750.81a.

As Judge Shapiro noted in his dissent below: "[T]he question is not whether as a general matter a defendant may be convicted of other crimes arising out of the assault, but whether the judicial system may adjudge a defendant guilty of two crimes when the statutes defining them make clear that factually only one can exist at a time, i.e., either a defendant has the intent to do great bodily harm or not." (COA opinion on remand, dissent pp 1-2; 50a-51a.

If, in a different case, a defendant were convicted under the other offense subsection of MCL 750.84, i.e, Subsection (1)(b) of Assault by Strangulation or Suffocation, which by its plain terms does not require an intent to do great bodily harm,[5] then MCL 750.84(3) would allow a simultaneous conviction for Aggravated Domestic Assault, based on the same conduct that forms the basis for conviction under MCL 750.84(1)(b). This is because a person can violate MCL 750.84(1)(b)(assault by strangulation or suffocation) while simultaneously violating MCL 750.81a(2) (domestic assault without intending to commit murder or to inflict great bodily harm less than murder). This stands in contrast to a violation of MCL 750.84(1)(a)(assault with intent to do great bodily harm), which by its very terms excludes a violation of MCL 750.81a(2) because of the conflicting mens rea provisions.

In creating two statutory offenses with diametrically opposed *mens rea* provisions, MCL 750.84(1)(a) and MCL 750.81a(2), the Legislature spoke with clarity. The otherwise broad language of MCL 750.84(3) does not support allowing

[5] As the Court of Appeals recently explained in *People v Barber,* ___ Mich App ___ (#339452, July 9, 2020), slip op 4, the original Senate bill provided that assault by strangulation would be a subcategory of AWIGBH, in that it provided:

> A person who assaults another with intent to do great bodily harm, less than the crime of murder, including, but not limited to, assaulting another by strangulation or suffocation, is guilty of a felony punishable by imprisonment in the state prison not more than 10 years or by fine of not more than $5,000.00, or both. As used in this section, "strangulation or suffocation" means intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person. [Senate Bill No. 848.]

"However, Legislators rejected this language in favor of language that makes clear that an assault by strangulation is not necessarily a subcategory of AWIGBH." *Id.*

convictions and punishments for offenses involving diametrically opposed *mens rea* provisions.

C. The Court of Appeals improperly looked to the legislative history where the statutory language is clear. Moreover, the Court of Appeals then misapprehended the meaning of the legislative history.

Judicial construction based on legislative history is not permitted where the statutory language is clear or if two provisions can instead be construed to avoid conflict without looking to the legislative history. *People v Hall*, 499 Mich 446, 454 (2016); see *People v Webb*, 458 Mich 265, 274 (1998). "Legislative history cannot be used to create an ambiguity where one does not otherwise exist." *In re Certified Question*, 468 Mich 109, 115 n 5 (2003).

As explained above, the plain language of the statutes compels the reading that Mr. Davis advocates. Yet the Court of Appeals' majority turned to the legislative history of MCL 750.81a and MCL 750.84 in order to read the words "without intending to commit murder or to inflict great bodily harm less than murder" out of the Aggravated Domestic Assault statute. *People v Davis (On Remand)*, unpublished per curiam opinion of the Court of Appeals, No. 332081, dated November 12, 2019, p 4-7; 46-49a.

The Court of Appeals' majority then misapprehended the import of that legislative history. As Judge Shapiro noted in his dissent: "*The majority undertakes a thoughtful analysis of legislative intent reviewing the interplay of various amendments. However, none of the amendments speaks to the specific contradictory language in the offenses before us.*" *Id*, dissent p 2, n 1 (emphasis added).

Significantly, the Legislature modified both MCL 750.81a and MCL 750.84 in April 2013. At that time, the Legislature added MCL 750.84(3), but declined to add the same or similar language to MCL 750.81a and it did not remove the contradictory *mens rea* provisions. This inaction, especially given that the Legislature revisited both statutes concurrently, is further evidence that the Legislature did not intend for a criminal defendant to be punished for both Aggravated Domestic Assault and AWIGBH arising out of the same conduct against the same person.

D. This Court does not need to overrule *People v Doss*. The *Doss* decision did not address a double jeopardy question and thus it does not control the result in this case. However, this Court should clarify that *Doss* is not to be extended beyond its narrow circumstances of a single charge.

In *People v Doss*, 406 Mich 90 (1979), this Court did not address a double jeopardy question. Mr. Doss was charged with a single count of statutory manslaughter, MCL 750.329. In *Doss*, this Court addressed the analytically distinct question of whether the statutory language "without malice" was an element of the offense that the People must prove. The Court of Appeals held that the Information should have been quashed because the People had failed to establish an essential element of the statutory offense, i.e., that the defendant acted "without malice". *Id.* at 96-98. This Court reversed, while noting that "it is manifestly impossible for an act to be at the same time malicious and free from malice", *Id.* at 98, and that "'[m]alice' or 'malice aforethought' is that quality which distinguishes murder from manslaughter." *Id.* at 99. However, this Court held that the prosecutor is not

required to prove an absence of malice, which it described as absence of an element, explaining that crimes do not have negative elements that must be proven. *Id.* at 99.

But *Doss* did not answer the question of whether it would violate double jeopardy principles for a defendant to be convicted of murder and statutory manslaughter for the same killing. Application of *Miller* answers that question in the affirmative, just as application of *Miller* here answers that convictions for both AWIGBH, MCL 750.84(1)(a), and Aggravated Domestic Assault, MCL 750.81a, based on the same assault constitutes a double jeopardy violation.

As demonstrated by the plain language of the statutes, the Legislature did not intend multiple punishments for Aggravated Domestic Assault and AWIGBH. Because the Legislature did not intend for a criminal defendant to be punished for these two offenses—which feature contradictory *mens rea* provisions—for the same acts against the same victim, Mr. Davis' convictions and sentences violate the state and federal prohibitions against Double Jeopardy. This Court must vacate his Aggravated Domestic Assault conviction, the less serious conviction.[6] *Miller,* 498 Mich at 26-27.

This Court should also take this opportunity to clarify that *Doss* should not be applied beyond the circumstances that were present within it, i.e., a single charge of an assaultive offense. This Court's holding in *Doss* makes sense in its context of a single charge of statutory manslaughter, i.e., a single charge of a crime that is a lesser

[6] Because Mr. Davis will be eligible for parole on February 16, 2021, he is no longer requesting that this Court additionally remand for resentencing on the remaining conviction for the greater offense.

offense to some uncharged greater offense as demonstrated by the negative element. This Court is loath to allow the guilty to go free without punishment by asserting that the prosecution has undercharged and over-proven its case. *People v Holtschlag*, 471 Mich 1, 20-21 (2004) (a defendant may not seek relief on sufficiency grounds on the basis that the prosecutor "'over-proved'" its case by proving the defendant acted with a more culpable *mens rea* than charged).

It does not make sense to extend *Doss* to cases where the prosecutor has charged a defendant with multiple offenses that contain contradictory provisions. Courts have been extending *Doss* to cases involving such charges, and so the juries in those cases have not been receiving instruction on the contradictory provision from the lesser offense. As here, a jury may then unknowingly convict the defendant of both offenses when the plain language of the statutes makes clear that factually only one can exist at a time. This is unjust. It deprives criminal defendants of their constitutional rights to a jury trial and to due process. See Issues II & III of Mr. Davis's application for leave to appeal. This Court should take this opportunity to clarify that *Doss* is not to be extended beyond its narrow circumstances of a single charge, so that conflicting *mens rea* provisions are not hidden from juries in cases involving multiple charges.

II. Mr. Davis is entitled to relief from the double jeopardy violation even though the error was not preserved in the trial court. Double jeopardy errors are jurisdictional or the equivalent and, as such, *Carines'* four-pronged test for unpreserved error that occurs in the conduct of a trial does not apply. Alternatively, if this Court finds that it does apply, Mr. Davis is still entitled to relief under that test.

A double jeopardy violation is a jurisdictional error or the equivalent as it eliminates the very authority of the State to convict or punish an individual. This means that not even a guilty plea waives a double jeopardy violation. *People v New*, 427 Mich 482, 488-489 (1986). Further, this means that the claim of error can be raised at any time and if the error is established the defendant is entitled to relief. A defendant is entitled to relief even when he raises the violation for the first time on collateral review in a motion for relief from judgment, pursuant to MCR 6.508(D)(3). So, the four-part test for unpreserved trial errors that this Court set out in *People v Carines*, 460 Mich 750, 763-764 (1999) is inapplicable.[7] Mr. Davis, who is on direct appeal, is entitled to relief from the double jeopardy violation without showing more even though he failed to preserve the claim of error in the trial court.

[7] The four-part test of *Carines* requires that the defendant establish that (1) an error occurred, (2) the error was "plain"—i.e., clear or obvious, and (3) the error affected substantial rights—i.e., the outcome of the lower court proceedings was affected; and (4) the plain, forfeited error resulted in the conviction of an actually innocent defendant or it seriously affected the fairness, integrity or public reputation of judicial proceedings. *Carines*, 460 Mich at 763-763, 774.

However, even if this Court holds that the plain trial error test of *Carines* applies to jurisdictional error, double jeopardy violations such as the one in this case satisfy the test given the character of the error. Mr. Davis would still be entitled to relief.

A. Jurisdictional errors go to the heart of the government's ability to exercise authority over individuals and thus cannot be waived or forfeited.

States are free to set their own preservation rules, even for federal constitutional issues. See *Carines,* 460 Mich at 761-768. In Michigan, this Court has held that there is a certain class of errors that cannot be waived, not even by an unconditional guilty plea, and that will receive full consideration on the merits and entitle the defendant to relief even when belatedly raised. *People v New*, 427 Mich 482, 488-493 (1986), citing *Menna v New York*, 423 US 61 (1975) and *Blackledge v Perry*, 417 US 21 (1974); *People v Carpentier*, 446 Mich 19, 27-30 (1994). This Court explained that these are errors that involve challenges to the very authority of the government to bring the defendant to trial or to punish him for the alleged offense. *Id.*

Although technically not the same, errors or defects that vitiate the authority of the government to prosecute or punish a defendant under any circumstances are

on par with jurisdictional defects.[8] *New,* 427 Mich at 492, citing *People v Johnson,* 396 Mich 424 (1976), abrogated on different grounds by *New*; *People v White,* 411 Mich 366, 387 (1981). This Court has explained, "[c]ertainly it is true that those rights which might provide a complete defense to a criminal prosecution, those which undercut the state's interest in punishing the defendant, or the state's authority or ability to proceed with the trial may never be waived by guilty plea. These rights are similar to the jurisdictional defenses in that their effect is that there should have been no trial at all." *Johnson,* 396 Mich at 444.

This type of error has come to be referred to simply as "jurisdictional" for short. *People v Lannom*, 441 Mich 490, 493 (1992) ("Another phrasing of this principle ... is that 'jurisdictional' defenses are not waived by a plea of guilty."); see e.g., *People v Horton*, 500 Mich 1034 (2017) (remanding a case to the Court of Appeals to determine whether a "speedy-trial claim is 'nonjurisdictional' as defined by *People v New*, 427 Mich 482 (1986)").

These jurisdictional errors stand in contrast to trial errors. Trial errors are errors that involve the manner in which a trial was conducted or the manner in which the government gathered the evidence against the defendant to present at trial, all of which can be waived or forfeited. *New,* 427 Mich at 491-493; see *People v Carter*,

[8] The Alaska Supreme Court calls these "fundamental errors" and has held that double jeopardy violations are among them. *Johnson v State*, 328 P3d 77, 82-85 (Alas; 2014). The Court explained: "[W]e do not need to address how or whether an unpreserved double-jeopardy claim would fit within the rubric of plain error. A claim of a double-jeopardy violation, even if unpreserved in the trial court, may be raised for the first time on appeal and will always be given full appellate consideration on the merits because the claimed error, if meritorious, would qualify as fundamental error. In cases of fundamental error, we have long recognized an exception to the general preservation rule." *Id.* at 83.

462 Mich 206, 217-219 (2000); *People v Cain*, 498 Mich 108, 114-116 (2015); *People v Randolph*, 502 Mich 1 (2018). This Court extended the concept of forfeiture to trial errors that were constitutional in nature in *Carines*, *supra.*

Jurisdictional errors are also in contrast to structural errors. Structural errors are errors in the very "framework" or "mechanism" of a trial for which the prejudice is hard to quantify but that affect the trial process itself rendering it no longer a reliable method to determine guilt or innocence such that prejudice is presumed. *Cain, supra* at 142-143 (Viviano, J. dissenting); *Arizona v Fulminate*, 499 US 279 (1991). This Court has extended the forfeiture doctrine to structural errors, holding that unpreserved claims of structural error are properly reviewed under the *Carines* four-part plain error test *People v Vaughn,* 491 Mich 642, 655 (2012); *Cain, supra* at 116.

B. This Court has held that double jeopardy violations are within the small class of jurisdictional errors.

Double jeopardy violations are among this small class of non-waivable "jurisdictional" errors that entitle a defendant to relief even when belatedly raised. *New*, 427 Mich at 492; *Johnson,* 396 Mich at 444-445, abrogated on different grounds by *New*; see *Class v US,* ___ US ___; 138 S Ct 798 (2018), accord *US v Broce*, 488 US 563 (1989) (double jeopardy was waived by the guilty plea where the claim was not apparent on face of the indictments and the existing record); see also *US v Ehle*, 640 F3d 689, 693 (CA 6, 2011). In *Johnson*, this Court held that a double jeopardy violation is treated like a jurisdictional defect because it goes to whether the government has the authority to prosecute or punish the defendant at all. This Court

re-approved that holding in *New*, while noting that other portions of *Johnson* were *ober dicta*. *New,* 427 Mich at 489-492. Other examples of jurisdictional error include, but are not limited to, where the offense statute is unconstitutional or inapplicable. *New, supra*; see *Class, supra*.

C. This Court has held that defendants are entitled to relief even on collateral review under MCR 6.508(D)(3) from jurisdictional defects such as double jeopardy. The Court of Appeals has applied this Court's holding to grant such relief on collateral review.

A double jeopardy violation, being a jurisdictional error as defined in *New*, entitles a defendant to relief even when the violation is raised for the first time on collateral review in a motion for relief from judgment. MCR 6.508(D)(3) provides that a defendant is entitled to relief from a jurisdictional defect without having to make a showing of good cause for the failure to raise it earlier and without having to make a showing of prejudice.[9]

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[9] MCR 6.508(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

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(3) alleges grounds for relief, **other than jurisdictional defects**, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial,

(A) but for the alleged error, the defendant would have had a reasonably likely chance of acquittal; or

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This Court has imported the definition or construct of "jurisdictional" from *New,* and before it *Johnson*; the term encompasses challenges to the very authority of the government to bring the defendant to trial and to punish him, into MCR 6.508(D)(3). *Carpentier*, *supra.* The "jurisdictional" defect exemption of MCR 6.508(D)(3) excuses a defendant from the requirements to show good cause for failure to raise the claim of error on direct appeal or in a prior motion and to show actual prejudice. This Court cited to *Johnson,* 396 Mich at 442, for its holding that a "'[d]efendant may always challenge whether the state had a right to bring the prosecution in the first place.'"[10] *Id.* at 27.

In *Carpentier,* this Court held that an alleged violation of an indigent defendant's constitutional right to the appointment of counsel raises a jurisdictional defect that if shown would entitle the defendant to relief under MCR 6.508(D)(3) without the defendant needing to meet the cause and prejudice requirements. *Carpentier,* 446 Mich at 27-30. This Court explained that "[c]ertainly, if a criminal defendant may obtain postconviction review by establishing 'good cause' and 'actual prejudice' under MCR 6.508(D)(3), that defendant may alternately procure review by

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> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;
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> ***

(Emphasis added.)

[10] "Not all constitutional errors…deprive the court of jurisdiction, only those that impugn the very authority of the court to try and convict the criminal defendant." *Carpentier*, *supra* at 47 (Riley, J., concurring).

properly alleging the jurisdictional defect contemplated and exempted from the requirements of this rule." *Id.* at 27.

In applying *Carpentier,* the Court of Appeals has repeatedly held that a double jeopardy violation is a jurisdictional defect that entitles a defendant to relief from judgment under MCR 6.508(D)(3), without the otherwise required showings of good cause for failure to timely bring the claim and actual prejudice. *People v Stapleton,* unpublished per curiam opinion of the Court of Appeals, issued August 2, 2018 (Docket No. 336402); *People v Rusiecki*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2002 (Docket No. 236651); *People v Hughes,* unpublished per curiam opinion of the Court of Appeals, issued December 1, 2000 (Docket No. 203069), abrogated on other grounds by *People v Ream*, 481 Mich 223 (2008).[11] The most recent example that Appellant located is from **2018**. *Stapleton, supra.*

Likewise, in reliance on *Carpentier,* the Court of Appeals has affirmed the grant of a motion for relief from judgment from a jury conviction for a non-existent offense, under MCR 6.508(D)(3), as a jurisdictional defect. *People v Hall*, unpublished per curiam opinion of the Court of Appeals, issued September 7, 2001 (Docket No. 227845). In *Hall, supra* at 4, the Court of Appeals explained:

> "A jurisdictional defect or its equivalent has been found where the defendant asserts improper personal jurisdiction, improper subject matter jurisdiction, **double jeopardy**, or imprisonment where the trial court had no authority to

[11] Copies of the unpublished Court of Appeals opinions cited in this brief were filed and served under separate cover. Appellant was unable to find published cases. MCR 7.215(C); MCR 7.212(C)(7); MCR 7.312(A). The page numbers cited are to those from the opinions printed off the Court of Appeals' website (COA Case Search) and filed under separate cover, which may be different from the page numbers used on Westlaw for unpublished opinions.

> sentence the defendant to the institution in question, or when the defendant was convicted for no crime at all. *Carpentier*, supra at 47-48 (Riley, J., concurring)." (Emphasis added.)

D. The Court of Appeals has wrongly extended the forfeiture doctrine to double jeopardy violations raised on direct appeal despite that such errors fall within this Court's definition of "jurisdictional defect."

Despite the exemption of double jeopardy violations from the 'good cause' and 'prejudice' requirements of MCR 6.508(D)(3), soon after this Court issued *Carines* the Court of Appeals extended the forfeiture doctrine to unpreserved claims of double jeopardy error *on direct appeal.* At first it did so in reliance on *Carines,* and later also added reliance on its own precedents that had previously relied on *Carines*. E.g., *People v Wilson,* 242 Mich App 350, 359-360 (2000); *People v Kulpinski*, 243 Mich App 8, 11-12 (2000); *People v Pfaffle*, 246 Mich App 282, 305-306 (2001); *People v Barber*, 255 Mich App 288, 291 (2003); *People v Matuszak*, 263 Mich App 42, 47 (2004); *People v Ackah-Essien*, 311 Mich App 13, 30-31 (2015); *People v Perry*, 317 Mich App 589, 600 (2016).[12] It has done so without acknowledgment that a double jeopardy violation is a jurisdictional error. *Id.* And it was doing so even before this Court extended the forfeiture doctrine to structural error in *Vaughn* and *Cain*.

[12] In all of these examples, the Court of Appeals held that there was no double jeopardy violation. Finding no error, it did not go on to apply the other three prongs of the *Carines* test for forfeited error.

E. Even so, the Court of Appeals routinely grants relief from "forfeited" double jeopardy violations with no discussion of the application of *Carines*.

The Court of Appeals' application of *Carines* to unpreserved double jeopardy claims appears to be essentially in name only. When the Court of Appeals has found that a double jeopardy violation occurred and deemed it forfeited, it has repeatedly granted relief. E.g., *People v Akins*, 259 Mich App 545, 567 (2003); *People v Bull*, 262 Mich App 618, 628 (2004); *People v Meshell*, 265 Mich App 616, 628-632 (2005); *People v Barber*, ___ Mich App ___ (#339452, July 9, 2020), slip op, pp 3, 6. The Court of Appeals has granted relief in these instances without any discussion of how the *Carines* four-part test was satisfied, as if relief is automatic. *Id.* Appellant could not locate an example where the Court of Appeals held that a double jeopardy violation occurred but that the defendant was not entitled to relief because the error was forfeited.

F. This Court has not authorized the extension of the forfeiture doctrine to jurisdictional errors, and it should not do so now.

This Court has not extended the forfeiture doctrine to claims of jurisdictional error, including double jeopardy violations. See *People v Miller*, 498 Mich 13, 16 (2015); *People v Ream*, 481 Mich 223, 226 (2008); *People v Herron,* 464 Mich 593 (2001). *Herron* was an appeal after the second trial. The Court of Appeals' opinion in *Miller* states that the double jeopardy claim was unpreserved and held it would be

reviewed for plain error affecting substantial rights.[13] *People v Miller*, unpublished per curiam opinion of the Court of Appeals, issued September 7, 2001 (Docket No. 314375), p 3.[14] In these cases, this Court does not specifically mention anything about preservation or lack of preservation. This Court applied de novo review and where it found error granted relief. *Miller,* 498 Mich at 16-17, 27; *Herron*, 464 Mich at 598-599, 613-614; *Ream, supra* (no error found).

This Court should not apply the forfeiture doctrine to claims of jurisdictional error due to the nature of the error and its harm. Jurisdictional errors are even worse than structural errors, to which this Court has extended the forfeiture doctrine. In addition to not being amenable to harmless error analysis, structural errors infect the whole trial process and render it fundamentally unable to give a reliable determination of guilt or innocence. *Cain, supra* at 143, 148 (Viviano, J. dissenting), citing *Neder v US,* 527 US 1, 8-9 (1999). But jurisdictional errors are uniquely harmful to the justice system and to people's faith in it. Claim of jurisdictional error are about whether the government had the authority to prosecute or punish the defendant in the first place. *New, supra*; *Johnson, supra.* If relief is granted to the defendant due to a jurisdictional error, the government has not lost anything to which it was entitled. In contrast, if relief is not granted to the defendant, the government

[13] The Court of Appeals' opinions in *Ream* and *Herron* make no mention regarding whether the double jeopardy claims were preserved below. *People v Ream*, unpublished per curiam opinion of the Court of Appeals, issued July 31, 2007 (Docket No. 268266); *People v Herron*, unpublished per curiam opinion of the Court of Appeals, issued April 6, 1999 (Docket No. 198353). The Court of Appeals' *Herron* decision was issued a few months before this Court's *Carines* opinion was issued.

[14] Please see footnote 11.

receives a windfall to which it has no rightful claim under the law. See *Lockhart v Fretwell*, 506 US 364, 369-379 (1993).

And there is always harm to the defendant from a jurisdictional defect including double jeopardy violations that resulted in concurrent sentencing such as in this case. As the US Supreme Court explained in *US v Ball,* 470 US 856 (1985), the second conviction itself constitutes harm:

> …the only remedy consistent with the [legislative] intent is for the [trial court], where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions. The remedy of ordering one of the sentences to be served concurrently with the other cannot be squared with [legislative] intention. **One of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense**. See *Missouri v Hunter*, 459 US 359, 368, 103 S Ct 673, 679, 74 L Ed 2d 535 (1983).
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> **The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence**. …. Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

Id. at 864-865 (emphasis added). The separate second conviction carries the societal stigma accompanying any criminal conviction. *Id.*

In addition, the separate concurrent conviction, can raise the sentencing guidelines range for the greater offense for which the sentencing guidelines are scored via Prior Record Variable 7 (PRV 7). MCL 777.57. This can result in a longer controlling concurrent sentence.

There are other harms too: an additional conviction may make the defendant appear less deserving of parole; it could result in an increased sentence under habitual offender statutes for a future offense, e.g., MCL 769.10-769.12, *People v Gardner,* 482 Mich 41 (2008), MCL 750.227b, *People v Wilson*, 500 Mich 521 (2017); depending on the offense, it may be used to impeach the defendant's credibility as a witness, MRE 609; it carries potential adverse collateral consequences, such as being ineligible under expungement statutes, MCL 780.621, or ineligible for some government benefits based on the number of prior felonies. See *Ball*, 470 US at 864-865.

G. Alternatively, if this Court does extend the forfeiture doctrine to jurisdictional error, this Court should hold that the nature of the double jeopardy violation satisfies prongs three and four of the *Carines*. Mr. Davis would still be entitled to relief.

The dissent in *Cain* suggested that the nature of structural error should mean that courts presume that the third and fourth prong of the *Carines* test are satisfied. *Id.* at 141-155 (Viviano, J. dissenting). Again, the nature of a jurisdictional error is even more offensive than that of structural error.

In *US v Meza*, 701 F3d 411, 431-435 (CA 5, 2012), the Fifth Circuit US Court of Appeals held that a forfeited double jeopardy violation in the multiple punishment strand was so antithetical to justice that it *sua sponte* raised the claim for the defendant and granted relief where the trial court had imposed consecutive sentences on the defendant.

That is not to say that consecutive sentences must have resulted in order to warrant relief for forfeited double jeopardy violations in federal court. In *US v Ehle*, 640 F3d 689, 699 (CA 6, 2011), the Sixth Circuit explained that upholding the two convictions that together violate the multiple punishment strand while vacating any resulting consecutive sentence is not sufficient to remedy a forfeited double jeopardy violation, relying on *Ball v US,* 470 US 856 (1985).[15] Only one conviction can be allowed to stand. *Id.*

The *Ehle* Court explained "'there can be no doubt'" that a double jeopardy violation "affects [defendant's] substantial rights and undermines the fairness and integrity of the judicial proceedings". 640 F3d at 699 (internal quotation marks and citations omitted). This is much like how the Michigan Court of Appeals already treats forfeited double jeopardy violations - that is as requiring reversal without the need for any discussion.

Mr. Davis is entitled to relief even under the four-part *Carines* test. The double jeopardy violation was plain error, in that convicting and sentencing him for both offenses was in contravention of the plain language of the statutes at issue, and thus clear and obvious, satisfying prongs one and two. See *Carines*. Mr. Davis can satisfy the third and fourth prongs due to harm imposed upon him by the unconstitutional conviction. *Ball, supra; Ehle, supra.* See subsection F above.

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[15] In *Ball,* the US Supreme Court explained that it is within the prosecutor's discretion to file and pursue charges at trial that would constitute a violation of the multiple punishment strand of the double jeopardy clause if the defendant were convicted of both. 470 US at 860-861. But if the defendant is convicted of both, one of the convictions must be vacated. *Id.* at 861.

Summary and Request for Relief

Defendant-Appellant **DAVIS** asks this Honorable Court to reverse and remand to have the trial court vacate his Aggravated Domestic Assault conviction, the less serious conviction.[16] In the alternative, he asks this Court to grant leave to appeal.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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_____

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[16] Because Mr. Davis will be eligible for parole on February 16, 2021, he is no longer requesting that this Court additionally remand for resentencing on the remaining conviction for the greater offense.